DEPARTMENT OF STATE REVENUE

04-20170243.LOF

Letter of Finding Number: 04-20170243
Sales Tax
For Tax Years 2013-15

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Business established that the sale, and subsequent repair, of tangible personal property was sourced to an out-of-state location.

ISSUE

I. Sales Tax - Exhibits & Storage.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-2.5-13-1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Zimmer, Inc. v. Indiana Dept. of State Revenue*, 72 N.E.3d 1031 (Ind. Tax Court 2017); 45 IAC 2.2-2-1; 45 IAC 2.2-6-8; Streamlined Sales Tax Governing Board: Rules and Procedures, Approved October 1, 2005 (amended October 11, 2017).

Taxpayer protests the Department's assessment of sales tax.

STATEMENT OF FACTS

Taxpayer manufactures, sells, and repairs trade show exhibits. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for the years 2013 through 2015. As a result of the Department's audit, proposed assessments were issued that included base tax, penalty, and interest. Taxpayer filed a protest with the Department. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax - Exhibits & Storage.

DISCUSSION

As a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

The audit report states that Taxpayer "failed to collect sales tax or provide a properly executed exemption certificate on sales of various trade show exhibit parts and delivery charges." The audit report states that although Taxpayer "provided properly completed exemption certificates for some of its exempt sales," that for the "remaining exempt sales" the Department allowed Taxpayer "an additional fifteen working days to obtain proof of the exempt status of the customers."

Taxpayer's protest letter states that it is specifically protesting "the assessment from 2015 . . . resulting from sales to one specific out-of-state customer." Thus what the audit report says about this specific customer is germane to the protest. The audit report states:

> Two specific exempt sales are being handled separately from the sales sample. The taxpayer did not collect sales tax on the modifications to a trade show exhibit for [Company H] in January and May of 2015. The exhibit was stored by the taxpayer for [Company H] at the taxpayer's facility both prior to and after the modifications. [Company H] was assessed a storage fee on this invoice for the storage of the exhibit in 2014. After the modifications and additions were complete, the exhibit was temporarily transported to a trade show in [another state]. The exhibit was returned to Indiana for storage at the taxpayer's location upon completion of the trade show. The taxpayer has indicated this exhibit was scrapped in Indiana during the course of the audit and is no longer in use.

The audit report concludes on this issue that the "addition of materials, to an existing exhibit located in Indiana, is an Indiana retail transaction subject to the Indiana sales tax. The taxpayer is assessed sales tax on the unitary price charged for each modification and addition." The audit report states that Taxpayer provided the auditor with exemption certificate forms (ST-105 and AD-70, respectively), but that both forms were not for "the customer in question" (i.e., Company H). Instead, the forms provided by Taxpayer were for a related entity of Company H. Summarizing Taxpayer's position, the audit report states:

> [T]axpayer contends the trade show exhibit was sold to [Company H] in an interstate commerce transaction and was not subject to Indiana sales tax. The taxpayer further indicates the exhibit was used by [Company H] 100[percent] of the time at non-Indiana trade show venues and event sites. Furthermore, the taxpayer contends its temporary storage of the exhibit in Indiana "does not make the transaction taxable as long as the events are hosted outside the State of Indiana which is the case for [Company H]."

The audit report's position is that the "customer requested the taxpayer perform modifications and additions to a trade show exhibit being stored at the taxpayer's location in Indiana." Since the "modifications and additions all occurred at the taxpayer's location in Indiana" the auditor found this to be "subject to Indiana sales tax" pursuant to IC § 6-2.5-2-1, 45 IAC 2.2-2-1, and 45 IAC 2.2-6-8.

Taxpayer disagrees with the audit report's finding, noting that the "sales were to an out-of-state customer and therefore no requirement to collect and remit sales tax or acquire [an] ST-105 existed." Regarding the temporary storage provided to the customer by Taxpayer, the following is argued:

> [T]he taxpayer did not provide for the sale being deemed an Indiana sale because approval was made outside of Indiana and there is no language in the contract or P.O. that would require or establish intent for the property to be returned to Indiana.

Turning to the applicable law, IC § 6-2.5-13-1 is of importance. That statute states in pertinent part:

> (a) As used in this section, the terms "receive" and "receipt" mean:
> (1) taking possession of tangible personal property;
> (2) making first use of services; or
> (3) taking possession or making first use of digital goods;
> whichever comes first. The terms "receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser.
> (b) This section:
> (1) applies regardless of the characterization of a product as tangible personal property, a digital good, or a service;
> (2) applies only to the determination of a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's retail sale of a product; and
> (3) does not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions of that use.
> (c) This section does not apply to sales or use taxes levied on the following:
> (1) The retail sale or transfer of watercraft, modular homes, manufactured homes, or mobile homes. These items must be sourced according to the requirements of this article.
> (2) The retail sale, excluding lease or rental, of motor vehicles, trailers, semitrailers, or aircraft that do not qualify as transportation equipment, as defined in subsection (g). The retail sale of these items shall be sourced according to the requirements of this article, and the lease or rental of these items must be sourced according to subsection (f).

(3) Telecommunications services, ancillary services, and Internet access service shall be sourced in accordance with IC 6-2.5-12.
(4) Direct mail, which shall be sourced in accordance with section 3 of this chapter.
(d) The retail sale, excluding lease or rental, of a product shall be sourced as follows:
(1) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
(2) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller.
(3) When subdivisions (1) and (2) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.
(4) When subdivisions (1), (2), and (3) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.
(5) When none of the previous rules of subdivision (1), (2), (3), or (4) apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold). (*Emphasis added*).
[. . .]

Indiana is a member of the Streamlined Sales Tax Agreement. Regarding repair work, the Governing Board Rules for the Streamlined Sales and Use Tax Agreement states in relevant part at 311.2 of the Rules and Procedures:

B. Except as otherwise provided in the Streamlined Sales and Use Tax Agreement or the rules adopted by the Governing Board, *a service performed on tangible personal property is received,* within the meaning of section 311.B of the Agreement, *at the location where the customer can potentially make first use of the tangible personal property on which the seller performed the service.* In general, this is the location where the tangible personal property is returned to the purchaser (or the purchaser's donee).

C. The following examples illustrate the proper determination of the location of "receipt" for services performed on tangible personal property.
1. Repair or maintenance of tangible personal property.
(a) A resident of State A takes a lawnmower to a repair shop in State B to have the engine serviced and the blade sharpened. When the lawnmower is ready, the owner picks it up at the repair shop. The repair service is received at the repair shop location in State B since the owner first has possession of the repaired item at that location. The repair transaction is sourced to State B under the provisions of Section 310.A.1 of the Agreement.
(b) Same facts as in Example C.1.a above except that the repair shop delivers the repaired lawnmower to the owner's residence in State A. In this case, the owner receives the service at that residence in State A since that is the location where the lawnmower is returned to the owner of the lawnmower. This repair transaction is sourced to the owner's residence in State A according to the provisions of Section 310.A.2 of the Agreement. [. . .] (*Emphasis added*).

Streamlined Sales Tax Governing Board: Rules and Procedures, Approved October 1, 2005 (amended October 11, 2017).

Taxpayer states that, for the issue being protested, the customer is located in State C and the "customer issues purchase orders from their location in [State C] to the taxpayer in Indiana to build specific exhibits and have the taxpayer either deliver or have delivered and set up the exhibits at the out-of-state location of the customer's choice." At the hearing, Taxpayer stated the exhibit was set up in a third state (i.e., not Indiana nor State C). Taxpayer argues that "final approval of the displays by [Company H] takes place at the location outside of Indiana at the time of delivery." Taxpayer also states that Company H "has no intention of using those exhibits in Indiana because they do not participate in exhibits within Indiana . . . ."

At first glance, Taxpayer's situation appears to be analogous to those in *Zimmer, Inc. v. Indiana Dept. of State Revenue*, 72 N.E.3d 1031 (Ind. Tax Court 2017). Zimmer is an Indiana headquartered company that "marketed its

products at . . . out-of-state trade shows and conventions." *Id*. at 1032. Zimmer hired a company (Catalyst Exhibits, "an Illinois-based exhibit house") that "annually design[ed] and manufactur[ed] a new exhibition booth" for Zimmer:

> Each year this exhibition booth incorporated some of the original, repaired, refurbished, or modified components of prior exhibition booths (e.g., counters, double-deck structures, structural beams, or walls). As a result, Zimmer arranged for some of its former exhibition booth components that it kept in its Indiana warehouse to be shipped to Catalyst Exhibits for incorporation into the new AAOS exhibition booth, while others were retained in its Indiana warehouse.

Id. at 1033 (Internal citations omitted). The Indiana Tax Court further stated:

> Zimmer's process of getting the exhibition booth components to and from the convention site was relatively consistent–approximately 15 semi-trucks moved the exhibition booth components from Catalyst Exhibits's [*sic*] Illinois location and Zimmer's Indiana warehouse to the convention site. Thereafter, independent third parties set-up and dismantled the exhibition booth at the convention site. After dismantling, the exhibition booth components were returned to Zimmer's Indiana warehouse for continued storage and for possible incorporation into other exhibition booths for approximately 15 other out-of-state trade shows.

Id. Upon return to "Zimmer's Indiana warehouse," if the exhibition booth "had major damage, it was shipped to Catalyst Exhibits for immediate repair," with "minor damage" being repaired by Zimmer's "in-house carpenter." *Id*. The Indiana Tax Court found the "Department's claim that Zimmer's revolving storage, out-of-state use, re-storage, and re-use rendered its exhibition booth components taxable . . . unpersuasive." *Id*. at 1035. However, regarding the repair work that Zimmer did to its own exhibit, the Indiana Tax Court found "the repairs in Indiana constitute taxable uses." *Id*. at 1036.

The Indiana Tax Court concluded:

> The undisputed material facts establish that Zimmer stored its exhibition booth components in Indiana for subsequent use solely at out-of-state trade shows, but that it repaired some exhibition booth components in its Indiana warehouse on an as-needed basis. Accordingly, the Court GRANTS summary judgment in favor of Zimmer on those exhibition booth components that were stored in Indiana for subsequent use solely outside Indiana. The Court GRANTS summary judgment in favor of the Department, however, on those exhibition booth components that were repaired in Indiana during the years at issue.

Id. at 1036-37.

The Department finds that the *Zimmer* case is dissimilar from the case at hand in important respects. *Zimmer* was a use tax case, whereas Taxpayer was assessed sales tax for the issue being protested. In *Zimmer* the taxpayer (*viz.,* Zimmer) was the purchaser; in the present case Taxpayer is the manufacturer and seller of the exhibit. And although in both *Zimmer* and the present case work was done to the exhibit(s) while being stored in Indiana, in the former it was the owner of the exhibit doing the work at its own warehouse facility by its own employee(s).

To the extent that the audit dealt with the initial sale of the exhibit, IC § 6-2.5-13-1(d)(2) states that "the sale is sourced to the location where receipt by the purchaser . . . occurs, including the location indicated by instructions for delivery to the purchaser . . . ." In this case, that would be the out-of-state location where the exhibit is set up for use. And to the extent that the audit dealt with modifications and additions to the exhibit upon its return to Indiana for temporary storage, pursuant to 311.2(B) "a service performed on tangible personal property is received . . . . at the location where the customer can potentially make first use of the tangible personal property on which the seller performed the service." That first use of the modified tangible personal property (i.e., the exhibit) also would be out-of-state.

As noted *supra*, Taxpayer's protest was regarding this specific issue. No other issues in the audit are addressed by this Letter of Finding.

FINDING

Taxpayer's protested issue is sustained.

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